142

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE,
R.S.O. 1980, c. 340

AND IN THE MATTER OF the complaint of Ms. Allison Hughes
against Dollar Snack Bar and Deiter Jeckel

AND IN THE MATTER OF the complaint of Ms. Lorry White
against Dollar Snack Bar and Deiter Jeckel

BOARD OF INQUIRY

Robert W. Kerr

Appearances:

Ms. Janet Minor)	Counsel for the Ontario Human Rights Commission and the Complaints, Ms. Allison Hughes and Ms. Lorry White

No appearance by or on behalf of the Respondents

Date of Hearing)	August 10, 1981
Place of Hearing)	Court House, 155 Elm Street West Sudbury, Ontario

DECISION

PRELIMINARY MATTERS

This decision involves complaints by each of the complainants against the respondent that they were discriminated against contrary to the Ontario Human Rights Code in that they were subjected to sexual harassment which constituted a sexually discriminatory condition of employment contrary to section 4(1)(g) of the Code and they were subsequently fired for refusing to submit to such harassment which constituted dismissal on account of sex contrary to section 4(1)(b) of the Code. Both complaints arose out of the employment of the complainants as waitresses at Dollar Snack Bar, a fast-food establishment owned and operated by the respondent, Deiter Jeckel.

Hearings into both complaints were scheduled for Sudbury on August 10, 1981 and notice thereof was personally served on the respondent. This service was effected on June 27, 1981 in the case of Lorry White's complaint. Due to a misunderstanding on the part of the human rights officer affecting service, who did not realize that two separate complaints were involved, service of notice of the hearing of Allison Hughes' complaint was not actually served until August 7, 1981. Counsel for the Commission advised me that she had been contacted by Mr. McDonald, a counsel who had indicated that he had been consulted by the respondent, Deiter Jeckel. Mr. McDonald had advised her that neither Mr. Jeckel nor any one representing him would be appearing at the hearing. Neither Mr. Jeckel nor anyone representing him made an appearance at the hearing.

I raised three preliminary questions with counsel for the Commission--first, whether the Board should proceed in the absence of Mr. Jeckel; secondly, whether Mr. Jeckel and the other party named as the respondent, Dollar Snack Bar, constituted one or two entities; and finally, the procedure to be followed in receiving evidence of the two separate complaints.

Upon proof of service of the notice of hearing upon Mr. Jeckel, the Board decided to proceed in his absence as authorized by the Statutory Powers Procedure Act, R.S.O. 1980, c. 484, s. 7. The Board was concerned by the shortness of formal notice of the hearing into Ms. Hughes' complaint to Mr. Jeckel. However, in light of the fact that the hearing of the other complaint was adequately notified to him and that, therefore, he was not caught by surprise in so far as physical arrangements for appearing were concerned, I concluded that there was no reason why, if he objected to this shortness of notice, Mr. Jeckel could not have attended to object. In the absence of any such objection, I decided that I should proceed. The Statutory Powers Procedure Act, s. 6(1), states only that notice must be reasonable. It does not specify any definite period. In the absence of any objection in these particular circumstances, I find the notice of the hearing of Ms. Hughes' complaint satisfies a minimum standard of reasonableness, although a similar period of notice in most other circumstances would not seem reasonable.

Another problem arose concerning notice of the hearing in that I had directed service of a covering letter concerning certain procedural matters to Mr. Jeckel along with the notice of hearing. My instructions in this regard were perhaps not made sufficiently clear and the letter was not delivered. The statutory requirements for notice were satisfied, however. In my view, therefore, nondelivery of the letter was not in itself a ground for refusing to proceed, although this nondelivery might have supported a motion for appropriate relief in relation to any procedural objections of Mr. Jeckel involving matters dealt with by the letter. In the absence of any such procedural objections, there was no reason to delay the hearing. A copy of the letter is appended to this decision in case there is any question conerning it.

With respect to the question of whether Mr. Jeckel and Dollar Snack Bar are one or two entities, counsel for the Commission was unable to assist me, except to advise that she understood Dollar Snack Bar was no longer in business. In the final analysis, the question appears moot. If Dollar Snack Bar has any separate existence, it received no notice of hearing. Therefore, I cannot make an order against it. In so far as Mr. Jeckel personally is concerned, the evidence clearly establishes that he was the person who controlled terms and conditions of employment at Dollar Snack Bar. Therefore, he is a "person" bound to observe the provisions of section 4(1) of the Ontario Human Rights Code, regardless of whether Dollar Snack Bar is a separate entity or merely a business name used by Mr. Jeckel. In light of this, the hearing proceeded on the basis that the only effective respondent was Mr. Jeckel. Throughout the rest of this decision the term "respondent" will be used to refer to Mr. Jeckel.

With respect to the procedure to be followed in receiving evidence, counsel for the Commission proposed to call each complainant and then offer corroborating evidence of both complaints. I ruled that I would allow counsel to proceed in this manner, but noted that I would be instructing myself carefully to observe the distinction between evidence relating to one case and that relating to the other.

A related evidentiary question which arises in such a case is the use of evidence of one complaint as similar fact evidence with respect to the other complaint. One of the areas of concern with respect to similar fact evidence generally is that the similarities may be indicative of collaboration between the witnesses, rather than of a pattern of deliberate conduct by the respondent: Director of Public Prosecutions v. Boardman, [1975] A.C. 421 (H.L.) It was evident that the complainants

in this case had been close friends before and during the employment that gave rise to their complaints. They freely admitted that they had discussed with each other the conduct of the respondent about which they were complaining. I conclude that it would be unduly prejudical to accept the evidence of one complaint in this case as similar fact evidence with respect to the other complaint. This does not preclude my accepting other similar fact evidence with respect to both complaints. Neither does it preclude the evidence that the complainants discussed the conduct of the respondent from serving to corroborate their complaints by showing that they had voiced some objection at the time of the events.

THE LAW

Having disposed of these preliminary matters, common to both cases, it is appropriate to set out the relevant legal principles which are also common to both cases before I proceed to deal separately with the merits of each case. I adopt the following statement of the law from the decision in Bell and Ladas and Flaming Steer Steak House Tavern Inc. (Ontario Board of Inquiry, Shime, 1980), at 4-6:

> Subject to the exception provided in Section 4(6), discrimination based on sex is prohibited by The Code. Thus, the paying of a female person less than a male person for the same job is prohibited, or dismissing an employee on the basis of sex is also prohibited. But what about sexual harassment? Clearly a person who is disadvantaged because of her sex is being discriminated against in her employment when employer conduct denies her financial rewards because of her sex, or exacts some form of sexual compliance to improve or maintain her existing benenfits. The evil to be remedied is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the work-place, and all of its benefits, free from extraneous pressures having to do with the mere fact that she is a woman. Where a woman's equal access is denied or when terms and conditions differ when compared to male employees, the woman is being discriminated against.

> The forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as gender based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment. There is no reason why the law, which reaches into the workplace so as to protect the work environment from physical or chemical pollution or extremes of temperature, ought not to protect employees as well from negative, psychological and mental effects where adverse and gender directed conduct emanating from a management hierarcy may reasonably be construed to be a condition of employment.
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> The prohibition of such conduct is not without its dangers. One must be cautious that the law not inhibit normal social contact between management and employees or normal discussion between management and employees. It is not abnormal, nor should it be prohibited, activity for a supervisor to become socially involved with an employee. An invitation to dinner is not an invitation to a complaint. The danger or the evil that is to be avoided is coerced or compelled social contact where the employee's refusal to participate may result in a loss of employment benefits. Such coercion or compulsion may be overt or subtle but if any feature of employment becomes reasonably dependent on reciprocating a social relationship proffered by a member of management, then the overture becomes a condition of employment and may be considered to be discriminatory.

To this, I would only add the point which I made in the case of Singh and Domglas Ltd. (Ontario Board of Inquiry, Kerr, 1980), at p. 19, in the context of racial harassment. In my view, harassment based on a factor in respect of which discrimination is unlawful is inherently in violation of the Ontario Human Rights Code since it singles out the victim for treatment on the basis of that factor. Thus, it is no defence that other employees are similarly treated.

THE COMPLAINT OF MS. HUGHES

The evidence supporting Ms. Hughes' complaint was quite strong. Ms. Hughes appeared honest and candid as a witness. In the absence of any contradictory evidence, it seems clear that she was subjected to unwelcome physical contact by the respondent with areas of her body that are

commonly associated with sexual advances. Ms. Hughes also testified that the respondent used his position as employer to answer her objections to this conduct. Another employee who worked on the same shift, Ms. Lavigne, stated that she had observed this treatment of Ms. Hughes. Ms. Lavigne and Ms. White confirmed that Ms. Hughes had spoken to them at the time of the respondent's conduct and her objections to it. In light of the strength of this evidence, I find it unnecessary to consider similar fact evidence with reference to Ms. Hughes' complaint. I am satisfied that Ms. Hughes was subjected to sexual harassment by the respondent as a condition of her employment. This constituted discrimination on account of her sex in violation of section 4 (1)(g) of the Code.

In the absence of evidence supporting some other explanation, the only reasonable conclusion is that Ms. Hughes' dismissal was because of her objections and reactions to the respondent's sexual harassment. This is just as much dismissal on the basis of sex as the harassment itself is a discriminatory condition of employment based on sex.

With respect to remedy, the respondent is clearly liable for the loss of income suffered by Ms. Hughes. Her testimony indicated that she made adequate efforts to mitigate and found alternative employment in April of 1980. Since she was fired on or about October 27, 1979, she lost employment for a period of approximately 22 weeks. Her wage rate was $3.00 an hour and she normally worked 40 hours per week. Her loss of wages, therefore, was $2,640. Although evidence was led that she received $69. per week unemployment insurance benefits during this period, this is a collateral benefit which is not relevant to the dispute between the parties. It may be, for example, that recovery of compensation for lost

wages will give rise to a claim for overpayment by the Unemployment Insurance Commission which would upset any calculation taking unemployment benefits into account.

Counsel for the Commission asked for an award of $750. to Ms. Hughes for the humiliation and embarassment she suffered. Such an award is supported by the recent precedent of the decision in Coutroubis and Kekatos and Sklavos (Ontario Board of Inquiry, Ratushny, 1980). This amount is rather larger than recent awards for similar loss suffered in cases of dismissal contrary to the Ontario Human Rights Code, where, as here, there is little evidence of actual substantial suffering by the complainant. However, a larger award is justified in case of harassment because of the ongoing nature of the wrong done to the complainant throughout the period of harassment. In a case of sexual harassment involving physical contact, the appropriateness of a sizeable award becomes even more apparent when it is recognized that each such contact constitutes a trespass to the person. This does not mean that I am attempting to assess damages for such trespass, but merely serves to confirm the seriousnesss of the wrong suffered by Ms. Hughes. On the basis of the evidence that Ms. Hughes was subjected to repeated such contact for a period of approximately 3 weeks, the requested $750. award is, if anything, conservative.

THE CASE OF MS. WHITE

The evidence in Ms. White's case is not as strong in support of her complaint as the evidence in the case of Ms. Hughes. The only direct corroboration of her own testimony was her reporting of the respondent's conduct to Ms. Hughes. However, as a witness Ms. White also appeared honest and candid. In the absence of any contradictory evidence, it

seems clear that she was also subjected to unwelcome physical contact by the respondent with areas of her body that are commonly associated with sexual advances. There was no testimony by Ms. White that the respondent had expressly used his position as her employer in support of this conduct as there was in the case of Ms. Hughes. However, in circumstances such as these where the respondent was the only person with authority over Ms. White in her employment, where the sexual advances continued over Ms. White's objections, and where these advances occurred right in the workplace during the course of employment, I have no difficulty in concluding that they should be interpreted as a condition of employment.

While only limited corroboration of Ms. White's evidence is available, no corroboration is required since there is no reason to doubt her testimony. Neither do I find it necessary to resort to similar fact evidence to support my findings. The primary purpose of such evidence is to rebut an alternative explanation of the respondent's conduct. Ms. White testified to physical contact of a character which does not admit of any other explanation than that of a sexual advance. Thus, there is no need for rebuttal of any alternative explanation.

I find, therefore, that Ms. White was discriminated against contrary to section 4(1)(g) of the Ontario Human Rights Code by being subjected to sexual harassment as a condition of employment.

Ms. White, confirming her candour as a witness, admitted that the respondent had given her a reason for dismissal which, if it was the real reason, would not be discriminatory. He told her she was dismissed for having failed to report for a shift to which she had been assigned. She testified that she had not been notified of this shift assignment and could not have been expected to know of it. I see no basis for

rejecting this testimony. In the absence of any other explanation, this leaves the most reasonable conclusion that the real reason for dismissal was Ms. White's rejection of the respondent's sexual advances. This constituted dismissal on the basis of sex, contrary to section 4(1)(b) of the Ontario Human Rights Code. I would observe that I am less strongly persuaded of this than I am in the case of Ms. Hughes since Ms. White seems to have been more timid in her rejection of the respondent's advances. However, the evidence is clearly strong enough to place the onus on the respondent to lead evidence of any alternative explanation and to find against him in the absence of such evidence.

Ms. White is entitled to compensation for the resulting loss of income. She testified to her efforts at mitigation which were quite adequate. She found alternative employment after 18 weeks. She was employed by the respondent at $3.00 an hour and normally worked 40 hours per week. Her loss of wages, therefore, was $2160. She received no unemployment insurance benefits, so such benefits would not affect the calculation even if they are relevant.

With respect to compensation for the embarrassment and humiliation suffered by Ms. White, counsel for the Commission asked for an award of $750., the same as in the case of Ms. Hughes. The evidence would suggest that Ms. White was subjected to less extensive harassment by the respondent, if for no other reason than that he appears not to have been present as much during her shifts. On the other hand, in view of the fact that Ms. White was younger (indeed she was still a minor at the relevant time) and was less self-assured than Ms. Hughes, I think it safe to conclude that she suffered as much or more. Even though there was no

evidence of substantial suffering, the continuing nature of the harassment over a three-week period and the fact that trespass to the person was involved support a larger than nominal award. This does not mean that I am attempting to assess damages for this trespass, but merely serves to confirm the seriousness of the wrong suffered by Ms. White. Moreover, on at least one occasion Ms. White suffered actual fear for her safety when the respondent blocked her exit from his office. Again, I think the requested award of $750. is, if anything, conservative.

RELIEF TO THE COMMISSION

While conceding that an undertaking of future compliance with the Code by the respondent in his business might be inappropriate since no such business presently exists, counsel for the Commission did suggest that he be ordered to give such an undertaking with respect to any business be might operate in the future. In the absence of evidence that such a re-entry into business is planned or imminent, I do not consider such an order to be proper. In the first place it would be too hypothetical. Secondly, it would be difficult to draft an order in terms that would be adequate without being overbroad. These factors would make it difficult to issue an order that could effectively be enforced and it is generally undesirable to issue an unenforceable order.

ORDERS

(a) Complaint of Ms. Allison Hughes

It is ordered that the Respondent Deiter Jeckel pay the Complainant Allison Hughes the sum of $3390 as compensation for loss of income in the amount of $2640 and for other injury in the amount of $750.

(b) Complaint of Ms. Lorry White

It is ordered that the Respondent Deiter Jeckel pay the Complainant Lorry White the sum of $2910 as compensation for loss of income in the amount of $2160 and for other injury in the amount of $750.

Dated this 20th day of August, 1981.

Robert W. Kerr
Board of Inquiry